

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 28 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN RAMIRO SARABIA ,

Defendant-Appellant.

No. 03-50431

D.C. CV-03-00113-R-O1

MEMORANDUM^{*}

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted October 18, 2005
Pasadena, California

Before: FRIEDMAN, O'SCANNLAIN, and PAEZ, Circuit Judges.

Since at oral argument the appellant John Ramiro Sarabia withdrew his challenge to the 41 months imprisonment to which he was sentenced, the only

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} Daniel M. Friedman, Senior United States Circuit Judge for the Federal Circuit, sitting by designation.

issues remaining involve the restitution the district court ordered Sarabia to pay, and the government's claim for a different item of restitution.

On Sarabia's guilty plea to a one-count information charging him with failure to collect and pay over employment taxes, in violation of 26 U.S.C. § 7202, the district court ordered him to pay restitution of \$373,251.96 to the victims of a telemarketing fraud in which he apparently was involved and for which four other individuals were convicted in a jury trial.

The Government concedes that this restitution was improper because it did not relate to the offense of conviction, which is failure to pay over taxes and not telemarketing fraud. We agree.

The Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 3663-64, governs the award of restitution in federal sentencing. A court may order that a defendant convicted under specified federal statutes, including an offense under Title 18, "in addition to . . . any other penalty authorized by law . . . make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate." 18 U.S.C. § 3663(a)(1)(A). The Act also authorizes a sentencing court to order restitution "to the extent agreed to by the parties in a plea agreement." 18 U.S.C. § 3663(a)(3). (The plea agreement that Sarabia signed, but

which the district court rejected, provided that the court “may order defendant to pay any additional taxes, interest and penalties that defendant owes to the United States.”).

Under these provisions, “a district court may not order restitution for any loss beyond that caused by the offense of which the defendant was convicted.” *United States v. Reed*, 80 F.3d 1419, 1422 (9th Cir. 1996) (quoting *United States v. Baker*, 25 F.3d 1452, 1456-57 (9th Cir. 1994)). Under the amended statutory provisions, restitution cannot be ordered “for conduct that is related to the offense of conviction, but that is not an element of the offense.” *Id.*

The restitution the district court ordered was designed to remedy the injury inflicted on victims of a telemarketing fraud. That was not “conduct that is related to the offense of conviction,” *id.*, which was failure to pay over to the government taxes Sarabia collected from employees or his companies. Accordingly, the district court had no authority to impose that restitution and its order doing so cannot stand.

The government, relying on the restitution provisions relating to plea agreements, proposes a remand for the district court to consider whether to order Sarabia to pay restitution to it for the taxes he collected from his employees. It is unclear from the record whether the government raised that issue before the district

court in the sentencing proceeding. If it did not, it cannot now argue the point here. If it did raise the issue, the district court's failure to address it must be viewed as a rejection of the claim. In that event, the government's failure to cross-appeal on the point precludes it from now raising the issue.

The portion of the district court's judgment that ordered Sarabia to pay restitution to the victims of the telemarketing fraud is reversed.

REVERSED.